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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ELEANOR S. SIMPSON
Petitioner

v.

DONALD M. SIMPSON
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

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78 pp

QUESTION PRESENTED

WHETHER A STATE COURT'S CHARACTERZATION AND DISTRIBUTION OF A FORMER SPOUSE'S PENSION BENEFITS UNDER THE UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT AS "ALIMONY" CONFLICTS WITH CONGRESS' CHARACTERIZATION AND DISTRIBUTION OF SUCH PENSION BENEFITS AS "PROPERTY" RESULTING IN PRE-EMPTION OF CONFLICTING PROVISION OF STATE DIVORCE DECREE.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii-vi

OPINION BELOW.....1

JURISDICTION.....2

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.....4

STATEMENT OF CASE.....5

HOW THE FEDERAL QUESTION WAS RAISED AND PASSED ON 7

REASONS FOR GRANTING WRIT.....13

CONCLUSION.....58

APPENDIX A - Final Judgment.....A-1--A-9

APPENDIX B - Decision of Fifth District Affirming Circuit Court Final Judgment.....B-1

APPENDIX C - Order of Fifth District Denying Motion for Rehearing.....C-1

APPENDIX D - 10 U.S.C. §1408(c)(1)...D-1

APPENDIX E - United States Constitution, Supremacy Clause, Art VI, Clause 2.E-1

TABLE OF AUTHORITIES

Cases

Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).....33,34,35,36

Chisnell v. Chisnell, 82 Mich.App. 699, 267 N.W. 2d 155, Cert. denied, 442 U.S. 940(1978).....15

Cullen v. Cullen, 413 So.2d 1196 (Fla. Dist. Ct. App. 1982).....21,22

Hartzell v. Hartzell, 434 So.2d 353 (Fla. App. Dist. 1983).....49,50,51,52

Higgins v. Higgins, 408 So.2d 731 (Fla. Dist. Ct. App. 1982).....21

Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979).....17,18,38,39,40,41,42,43 45,47,48

In re: Eithian, 10 Cal. 3rd 592, 111 Cal. Rptr. 369, 517 P.2d 449.....14,15

Jenkins v. State, 385 So.2d 1356 (Fla. 1980).....2

McCarty v. McCarty, 453 U.S. 210 (1981)

Palmore v. Sidoti, ___ U.S. ___, 104 S.Ct. 1879 (1984).....3

Rogers v. Rogers, 401 So.2d 406 (La. 1981).....14

Russell v. Russell, 605 S.W. 33 (Ky. Ct. App. 1980).....16

U.S. v. Davis, 370 U.S. 65.....48

Wissner v. Wissner, 338 U.S. 655 (1950).....14

Statutes

5 U.S.C. §8354(j)(1976 and Supp. III 1979).....29

10 U.S.C. §1004.....33

10 U.S.C. §1005.....33

10 U.S.C. §1006.....33

10 U.S.C. §1408(c)(1).....4,23,33,49

10 U.S.C. §1408(c)(2).....32

10 U.S.C. §1408(c)(3).....30

10 U.S.C. §1408(d)(1).....31,44

10 U.S.C. §1408(d)(4).....32

10 U.S.C. §1408(e)(1).....32

10 U.S.C. §1408(3)(b).....32

10 U.S.C. §1408(4).....5

22 U.S.C. §4054 (Supp. IV 1980).....5

28 U.S.C. §1257(3).....2

42 U.S.C. §659(b).....44

45 U.S.C. §231.....25,38,45

45 U.S.C. §231(d)(c)(3).....39

45 U.S.C. §231m.....38,45

50 U.S.C. §403.....29

I.R.C. §71(a).....48

I.R.C. §215.....48

Fla. Stat. §61.08(1) 9

United States Constitution

United States Constitution, Art. VI, cl2..... 4,25

Florida Constitution

Fla. Const. Art. V §3(b)(3).....2

Other Authorities

1982 U.S. Code Cong. & Ad. News 1596.....23,24,27,29,44

Hauserman & Fethke, "Military Pensions as Divisible Assets: The Uniformed Services Former Spouses' Protection Act", 11 J. Legis. 27 (1984).....54

Horkovich, "Uniformed Services Former Spouses' Protection Act: Congress' Answer to McCarty v. McCarty Goes Beyond the Fundamental Question", 23 A.F.L. Rev. 287 (1982-1983) .. 14,15,16,18,20,28,29,54

Mallory, "Military Retired Pay and Divorce: Congress Retires McCarty v. McCarty - Is That Enough?" 40 Wash. & Lee. L.Rev. 271 (1983).....54

Winter, "Divisibility of Military Non-Disability Retirement Pension Benefits Upon Marriage Dissolution: McCarty v. McCarty, the Uniformed Services Formed Spouses' Protection Act and Beyond", 22 J. Fam.L. 333 (1983-84). 20,54

The Petitioner, ELEANOR S. SIMPSON, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District Court of Appeal of Florida, Fifth District entered in this proceeding on January 31, 1984.

OPINION BELOW

The Circuit Court in and for Orange County, Florida of the State of Florida entered a Final Judgment of Dissolution of Marriage on May 26, 1983. The opinion of the Florida Circuit Court is reprinted in the Appendix A to this Petition. The Petitioner timely appealed to the Florida District Court of Appeal, Fifth District, which affirmed the judgment of the Florida Circuit Court without issuing an opinion on January 31, 1984. That Court's Order of Affirmance is reprinted in Appendix B to this Petition.

JURISDICTION

The Order of Affirmance of the Florida District Court of Appeal, Fifth District was entered on January 31, 1984. Petitioner timely filed a Motion for Rehearing with the Fifth District Court of Appeal. On May 29, 1984 the Fifth District Court of Appeal denied the Motion for Rehearing. That Order is reprinted in Appendix C to this Petition.

The jurisdiction of this Court to review the case on Petition for Certiorari rests on 28 U.S.C §1257(3). Because the Fifth District Court of Appeal elected not to write an opinion, the Supreme Court of Florida was without jurisdiction to review this case and the Fifth District Court of Appeal is the highest state court in which a decision could be had. Fla. Const. Art. V §3(b)(3); Jenkins v. State, 385 So.2d

1356 (Fla. 1980); Palmore v. Sidoti, _____ U.S. _____, 104 S.Ct. 1879, 1881 (1984).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Uniformed Services Former Spouses' Protection Act (hereinafter USFSPA) 10 U.S.C. §1408(c)(1) (Appendix D) and the Supremacy Clause of the United States Constitution reprinted in Appendix E to this Petition.

STATEMENT OF THE CASE

The parties were married shortly after Respondent's graduation from the United States Military Academy at West Point on September 2, 1939. The parties had one child, a son, who is now an adult. During their forty-two (42) years of marriage, the Respondent served in the Army and retired as a Colonel. As such, he was entitled to draw a "monthly retired pay" with a value of $235,272.97 (trial transcript Vol. III, p.510), as that term is defined in 10 U.S.C. §1408(4). At the time of the final hearing Respondent was drawing said retired pay.

On December 9, 1981, the Petitioner filed an action for alimony unconnected with dissolution of marriage in the Circuit Court in and for Orange County, Florida. On January 21, 1982, the Petitioner filed an Amended Petition for

Dissolution of Marriage requesting, inter alia, equitable distribution of the Respondent's military retirement benefits. (Record on Appeal, p.918 ¶14)

After extensive pre-trial discovery, the matter was set for trial but was continued upon motion of the Petitioner due to the passage of the Uniformed Services Former Spouses' Protection Act which would affect the distribution of the marital estate. (Record on Appeal, pps. 1255-1350 and 1357-1358; Respondent's Answer Brief, p.3) The Petitioner requested that the trial court take judicial notice of the USFSPA and supplied the Court with a copy of same (Record on Appeal, pps. 1255-1350).

After trial of this matter, the trial court entered a Final Judgment on May 24, 1983 which awarded the Petitioner, inter alia, as "permanent periodic alimony fifty percent (50%) of the net

disposable proceeds of Donald M. Simpson's retired U.S. Army pay entitlement". (Appendix A, p. A-3, 4 ¶8) The Final Judgment also provided that payment of such proceeds would be made once a month by the Respondent through the Clerk of the Circuit Court. The Final Judgment of Dissolution of Marriage is reprinted in Appendix A to this Petition.

HOW THE FEDERAL QUESTION WAS RAISED AND PASSED ON

The Amended Petition for Dissolution of Marriage sought equitable distribution of, inter alia, the military retired pay. (Record on Appeal, p. 918 ¶14) The Petitioner sought a continuance of the trial in order to secure her rights as a former military spouse under the USFSPA. (Record on Appeal, pps. 1255-1350 and 1357- 1358) Prior to trial the trial court was requested to take judicial notice of the USFSPA. (Record on Appeal, pps. 1255-1350).

During the trial, the Petitioner herself stated as follows:

> "I need an income for life, similiar, equal. We are dividing property. And I want an income comparable to Tim's [Respondent's]." (Trial transcript p.480)

In his closing remarks, counsel for the Petitioner stated, with respect to the division of the retired pay, as follows:

> "Then, your Honor, an alternative, either fifty percent (50%) of all the pensions divided equally amongst the parties and then fifty percent (50%) of the remaining assets, or adjustment of assets..." (Trial transcript p.560)

The Petitioner's proposed Final Judgment of Dissolution of Marriage provided as follows:

> 1. That the Wife is awarded $250,000.00 of the party's assets (or in the alternative, (A) That the parties have been married for 42 years and that the Husband served at least 10 years of creditable service in the United States Army, and the Wife is awarded 50% of the Military Retirement Pay by direct payment of the Army Department of Finance as part of equitable distribution of assets. Additionally, the Court being aware of the Husband's agreement to voluntarily assign all Survivor Benefits of Military

> Retirement Pay to the Wife, such voluntary assignment is incorporated herein and the parties are directed to execute all written documents necesssary now, or in the future, to comply herein. In the event direct payments do not commence in May, 1983, Husband is directed to pay 50% of the Military Retirement Pay to Wife within 2 days of receipt, until such direct payments begin. Withholding taxes shall not be deducted before computation. (B) That the Wife is awarded 50% of the Martin-Marietta Pension prior to deductions as partial equitable distribution of assets. (C) That the parties shall receive whatever Social Security Benefits as are directly payable to each respectively and shall have no claim to the other's share.)

The Circuit Court passed on the federal question by awarding Petitioner the retired pay as permanent periodic alimony instead of as a direct payment to effectuate an equitable distribution of the property. (Appendix A, p.A-3, 4 ¶8)

In the Petitioner's brief before the Fifth District Court of Appeal, Petitioner argued as follows:

> Florida Statutes §61.08(1), specifically provides that adultery

may be considered in determining the amount of alimony. Here, the court awarded Appellant one-half (1/2) of the net disposable pension plan that was earned during the marriage and it should, if awarded to her, be awarded as division of property. Alimony should come from his half---not her half. We would have preferred an adjustment of assets per the unopposed expert testimony of Ronald Hirsch. (Appellant's Brief pp.9-10) (emphasis added)

Elsewhere, in Petitioner's appellate brief before the Fifth District Court of Appeal, the Petitioner stated as follows:

> Permanent periodic alimony awarded here on fifty percent (50%) of disposable net pay is subject to adjustment each year because of his income tax refunds and future benefits for other people being deducted from her portion without control.

On January 31, 1984, the Florida District Court of Appeal, Fifth District, affirmed the judgment of the Circuit Court without issuing an opinion.

In her Motion for Rehearing, Petitioner raised the point that the USFSPA "overrides state law and renders obsolete state court decisions in conflict with it". (Motion for Rehearing, p.1) The Motion went on to quote the operative portion of the statute allowing divisibility of military retired pay. The Motion then stated as follows:

> Colonel Simpson's military retired pay represents an asset that should be divided as an equitable distribution and not as alimony. The cost to Mrs. Simpson of calling it alimony is great, as alimony is taxable to her and will terminate should she ever remarry.
>
> Even more important than the name by which this distribution is called, is her request that payment to her be made directly from the U.S. Army Paymaster.
>
> For these reasons, Appellant urges the Court to reconsider its decision of January 31, 1984 and award to Appellant one-half (1/2) of Colonel Simpson's disposable military retired pay as equitable distribution of a joint asset, to be paid directly to her by the Federal Government, and request further that division of the retired pay be made before deduction

of sums for savings deposits, payment of insurance, or other items that do not benefit Mrs. Simpson. (Motion for Rehearing p.3)

On May 29, 1984, the Fifth District Court of Appeal denied the Petitioner's Motion for Rehearing. (Appendix C)

REASONS FOR GRANTING THE WRIT

The Decision Decides a Federal Question in a Way in Conflict With Applicable Decisions Of This Court Interpreting Supremacy Clause.

The decision of the trial court which characterized the wife's pension benefits under the USFSPA as "alimony" conflicts with Congress' characterization of such pension benefits as "property" thus requiring pre-emption under the Supremacy Clause.

A. DIVISIBILITY OF MILITARY RETIRED PAY PRIOR TO McCARTY v. McCARTY.

Before McCarty v. McCarty, 453 U.S. 210 (1981) virtually all of the community property states and a number of the "equitable distribution" states had ruled that retired military pay was a marital asset, subject to division upon

divorce or dissolution of marriage.[1] However, common law states held just the opposite.[2]

In In Re: Eithian, 10 Cal. 3rd 592, 111 Cal. Rptr. 369, 517 P.2d 449, the husband contended that under the Supremacy Clause, characterizing his military retired pay as community property was disallowed by the federal statutory provisions for military retirement. The Court ruled against the husband after assessing military retired pay against a five part "test" for pre-emption drawn from Wissner v. Wissner, 338 U.S. 655 (1950) and an evaluation of congressional purpose.

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1 Horkovich, "Uniformed Services Former Spouses' Protectin Act: Congress' Answer to McCarty v. McCarty Goes Beyond the Fundamental Question", 23 A.F.L. Rev. 287 (1982-1983) (hereinafter "Horkovich")

2 Id. at 290.

Importantly, the court found that there was no indication that Congress had intended military retired pay to be separate property and that there was no express prohibition against treating military retired pay as community property.[3]

In Chisnell v. Chisnell, 82 Mich. App. 699, 267 N.W. 2d 155, Cert. Denied, 442 U.S. 940 (1978), the husband raised the same contention and the Court, relying on the reasoning of In Re: Eithian, supra, found no violation of the Supremacy Clause.

In Rogers v. Rogers, 401 So.2d 406 (La. 1981), the husband also alleged a conflict between community property treatment of military retired pay and the federal statutes. The court stated that community property laws as applied to military retired pay will be invali-

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[3] Horkovich at 292.

dated under the Supremacy Clause only if Congress "has positively required by direct enactment that state law be pre-empted," and that in addition to conflicting with "express terms" of a federal law, to be invalid, a state law must "sufficiently injure the objectives of the federal program." 401 So.2d at 407 The court concluded that Louisiana community property laws were not pre-empted because there was "not a single "direct enactment" by Congress concerning the community or non-community nature of all federal retirement benefits."[4]

In Russell v. Russell, 605 S.W. 2d 33 (Ky. Ct. App. 1980), the Court held that division of military retired pay as marital property would conflict with the federal statutory scheme.

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4 401 So.2d at 409; Horkovich at 292.

B. THE McCARTY DECISION

In McCarty, this Court held that military retired pay was a personal entitlement and was not divisible upon divorce or dissolution of marriage in a community property state. The Court applied the test established in Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979): "Whether the right as asserted conflicts with the express terms of federal law, and whether its consequences sufficiently injure the objective of the federal program to require non-recognition."[5] The Court concluded that " the application of community property law conflicts with the federal military retirement scheme regardless of whether retired pay is defined as current or as deferred compensation."[6]

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[5] 453 U.S. at 221.

[6] Id. at 223.

In support of this decision the Court found that military retired pay was historically considered a "personal entitlement" payable to the retiree and that no entitlement accrued to the spouse.[7] The Court stated that community property division of military retired pay would defeat congressional intent "that military retired pay 'actually reach the [retiree]'." "Congress has neither authorized nor required the community property division of military retired pay."[8]

As to whether there was a conflict between the federal military retirement

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[7] Id. at 224.

[8] Id. at 232; Horkovich at 293.

provisions and the state community property laws, the Court found that there was a potential to frustrate the objectives of the military retirement program since division of the pay would reduce the amount intended for the retiree as his personal entitlement.[9]

The Court stated that division of retired pay would interfere with the federal program because "retired pay is one of the inducements... to make military service attractive."[10]

While the majority expressed its sympathy for the "plight of an ex-spouse",[11] the Court stated

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9 Id. at 233.

10 Id. at 235

11 Id. at 235.

that a decision to provide for the ex-spouse should be left to Congress.[12]

C. POST-McCARTY DECISIONS

In "equitable distribution" states the McCarty rule was held to apply despite an unfavorable response by some state courts.[13]

However, the McCarty decision did not preclude considering military retired pay for the purpose of determining an award of alimony or spousal support.[14] In McCarty, the Court

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12 Id. at 236.

13 Horkovich at 295 and the cases cited therein; Winter, "Divisibility of Military Non-Disability Retirement Pension Benefits Upon Marriage Dissolution: McCarty v. McCarty, the Uniformed Services Formed Spouses' Protection Act and Beyond", 22 J.Fam.L. 333, 342 (1983-84).

14 Horkovich at 295.

distinguished between child support or alimony and community property noting that Congress has expressly provided for garnishment of military retired pay to secure child support or alimony.[15]

In Higgins v. Higgins, 408 So.2d 731, (Fla. Dist. Ct. App. 1982), the First District Court of Appeal held that the McCarty ruling did not prohibit a state divorce Court from considering military pensions in support proceedings and that there is no violation of McCarty when a Florida court awards permanent periodic alimony after consideration of a military pension as an asset of an property of the retiring spouse. In Cullen v. Cullen, 413 So.2d 1196 (Fla.

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15 McCarty, supra, 453 U.S. at 230.

Dist. Ct. App. 1982), the First District Court of Appeal held that McCarty did not proscribe an award of alimony from military retirement pension proceeds because community property and alimony awards rest on two different legal foundations:

> Community property is explained as including property and pecuniary rights obtained by, or in the name of either the husband or wife after marriage by productive faculty... alimony is an allotment of sums of money payable at regular intervals or in a lump sum, as distinguished from a portion of a spouse's estate, and it is an obligation imposed by law separate and distinct from the parties property rights.[16]

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16 Cullen, supra, 413 So.2d at 1198.

D. THE UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

The Uniformed Services Former Spouses' Protection Act, (hereinafter USFSPA) 10 U.S.C. §§1401 et seq was enacted for the express purpose of removing the effect of the McCarty decision by permitting state courts, consistent with the appropriate laws, to once again consider military retired pay when fixing the property rights between the parties to a divorce, dissolution, annulment or legal separation.[17]

The pertinent section of the legislation is 10 U.S.C. 1408(c)(1) which states as follows:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981 either as property as solely of the member or

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17 1982 U.S. Code Cong. & Ad. News 1596.

as property of the member and his spouse in accordance with the law of the jurisdiction of such Court. (emphasis added)

The intended effect of this section is that there would no longer be any exclusion or pre-emption recognized for military benefits. The legislative history indicates that nothing in the section requires any division of the military retired pay; it leaves that issue up the courts applying community property, equitable distribution or other principles of marital property determination and distribution.[18]

E. PROPERTY UNDER USFSPA DIFFERENTIATED FROM ALIMONY UNDER STATE LAW

1. "Property" under USFSPA

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18 1982 U.S. Code Cong. & Ad. News 1596, 1611.

the Railroad Retirement Act since under the Supremacy Clause of the United States Constitution (Art. VI, cl 2) such an award would impermissibly conflict with the provisions of the Railroad Retirement Act.[37]

The reasoning of the Court was that to order the husband to pay the wife an appropriate portion of his benefit or it monetary equivalent, as he received it, would run contrary to the language and purpose of §231m of the Railroad Retirement Act which exempts benefit from funds from legal process and is meant to insure that benefits actually reach the intended beneficiary.[38]

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37 Hisquierdo, supra, 439 U.S. at 590.

38 Id. at 585.

The USFSPA was intended to restore military divorce proceedings to their pre-McCarty status by authorizing states to determine whether military retired pay will be divided as marital or community property in accordance with their respective domestic relations laws.

However, while the USFSPA purports to restore military divorce proceedings to their pre-McCarty status, it is clear that the Act goes far beyond that and pre-empts a state court's characterization of the pension as anything other than "property".

It must be emphasized that in McCarty this Court recognized that the plight of an ex-spouse of a retired service member is a serious one and that Congress may well decide that more protection should be afforded a former spouse of a retired service member. Indeed, that is exactly

what Congress did when it enacted the USFSPA.

The legislative history of the USFSPA makes mention of the contributions and sacrifices made by military spouses throughout the service member's career. The Committee on Armed Services to which the bill was referred concluded that "the unique status of the military spouse and that spouse's great contribution to our defense require that the status of the military spouse be acknowledged, supported and protected."[19]

The most important thing about the legislation is its classification of military retired pay as "property." Although the USFSPA does not directly categorize military pay as either

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19 1982 U.S. Code Cong. & Ad. News, 1596, 1601.

deferred or current compensation,[20] the characterization of military retired pay as "property" evidences Congress' treatment of retired pay as "property" earned or accrued during the marriage which is consistent with the concept of deferred, rather than current, compensation.[21] This categorization of the retired pay as "property" and thus deferred compensation overturns the doctrine reaffirmed by McCarty that retired pay was current compensation and a personal entitlement of the retired member.

The importance of this is that if military retired pay is classified by Congress as "property" after a divorce,

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20 Horkovich at 313.

21 Horkovich at 314.

it follows that it was also "property" prior to the divorce and therefore if it is going to be divided it must be divided as "property" and nothing else.[22]

Several members of Congress also pointed to the need and desirability of enacting legislation that would place the military ex-spouse in a position comparable to ex-spouses of other government employees:

> "Congress has responded to the needs of former spouses of government employees and set a precedent by enacting Public Law (95-366) codified at 5 U.S.C. §8354(j)(1976 and Supp. III 1979), in 1978, the Foreign Service Act codified at 22 U.S.C. §4054 (Supp. IV 1980) in 1980 and the C.I.A. Spouses' Equity Act of 1982. (to be codified at 50 U.S.C. §403). We now should carry this concept one step further by including military retirement pay as marital property."[23]

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22 Horkovich at 314.

23 1982 U.S. Code Cong. & Ad. News 1596-1598.

While the USFSPA does not create any property interest capable of transfer or disposal in any manner by the spouse,[24] the Act does go beyond just the creation of a benefit that a state court may or may not divide among the former spouses. The Act requires the respective service secretary to comply, within limitations, with valid state property division decrees concerning redirection of military pension proceeds and to commence making payments to the former spouse within ninety (90) days after valid service if the member is retired, or within ninety (90) days

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24 10 U.,S.C. §1408(c)(3)

subsequent to the members date of retirement.

This federal enforcement mechanism is available to the military spouse based on the duration of the marriage. If the marriage lasted ten (10) years or more while the member was in the armed forces, the spouse may receive direct payments based on the property division taken from the members retired pay by the respective military finance center.[25] If the marriage lasted less than ten (10) years, the spouse will not be entitled to receive any portion of the member's pension annuity from the military finance center. The payments will terminate in accordance with the terms of the decree and will

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25 10 U.S.C. §1408(d)(1).

terminate in any event upon the death of either member or spouse.[26] The maximum payable amount to the ex-spouse is restricted to fifty (50) percent of disposable retirement pay.[27]

Significantly, the Act provides that under no circumstances will the act be construed to shield a member from his liability for alimony, support, or any other Court ordered payments, which are otherwise fully enforceable by legal process.[28] This evidences Congress'

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26 10 U.S.C. §1408(c)(2) and (d)(4).

27 10 U.S.C. §1408(e)(1).

28 10 U.S.C. §1408 (3)(6).

intent to differentiate the "property" referred to in §1408(c)(1) from "alimony". The Act also gives the military spouse authorization to participate in a member's Surviving Dependent's Annuity Plan (SBP) Act at §1447-55, commissary, base exchange, and medical care benefits for certain ex-spouses.[29]

2. "Alimony" in Florida

Permanent periodic alimony in Florida is used to provide the needs and necessities of life to a former spouse as they have been established by the marriage of the parties.[30] The two

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29 10 U.S.C. §1004, 1005, 1006.

30 Canakaris v. Canakaris, 382 So.2d 1197, 1201 (Fla. 1980).

primary elements to be considered when determining permanent periodic alimony or the needs of one's spouse for the funds and the ability of the other spouse to provide the necessary funds. The criteria to be used in establishing this need include the parties earning ability, age, health, education, the duration of the marriage, the standard of living enjoyed during its course, and the value of the parties' estates.[31]

As a general rule, permanent periodic alimony is terminated upon the death of either spouse or the remarriage of the receiving spouse.[32]

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31 Id. at 1202.

32 Id. at 1202.

Once instituted, permanent periodic alimony is subject to modification upon a substantial change of circumstances, and may be converted to rehabilitative alimony if the circumstances warrant such a change in the alimony scheme.[33]

3. Alimony, Equitable Distribution And Retired Pay

With the decision of the Supreme Court of Florida in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), the State of Florida joined the ranks of "equitable distribution" states. In Canakaris, the Court gave trial courts the discretion to use lump sum alimony to insure an equitable distribution of property acquired during the marriage provided the evidence reflects (1) a justification for lump sum payment and

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[33] Id. at 1202.

(2) financial ability of the other spouse to make such payment.[34]

The Court pointed out that a trial judge in dissolution proceedings possesses "broad discretionary authority to do equity between the parties" and has available various remedies to accomplish this purpose, including lump sum alimony, permanent periodic alimony, rehabilatative alimony, child support, a vested special equity in property, and an award of exclusive possession of property.[35]

In the instant case, the trial court, over Petitioner's objection, awarded the Petitioner as permanent periodic alimony

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34 Canakaris, supra, 382 So.2d at 1205.

35 Id. at 1202.

fifty percent (50%) of the net disposable proceeds of the Respondent's retired payment entitlement. The Final Judgment requires that the Respondent pay said amount to the Clerk of the Circuit Court who would promptly remit said monies to the Petitioner.[36] Petitioner had sought direct payment from the service secretary of the retired pay in order to effectuate an equitable disribution of the retired pay.

However, by utilizing the vehicle of permanent periodic alimony to effectuate the equitable distribution of the marital property, which in this case was the retired pay, the trial court violated the congressional characterization in the USFSPA of military retired pay as

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36 Appendix A, p. A-3, ¶8.

"property". Furthermore, once the trial court changed the characterization of the military retired pay from "property" to "alimony", the trial court deprived Petitioner of the very benefits to which she was entitled under the USFSPA.

F. IMPERMISSIBLE CONFLICT UNDER HISQUIERDO

In Hisquierdo, 439 U.S. 572 (1979), this Court considered whether a community property award to a wife of an interest in the husband's expected benefits under the Railroad Retirement Act of 1974 (45 U.S.C §231 et seq) impermissibly conflicted with the Railroad Retirement Act. This Court held that the California Supreme Court was precluded from applying state community property rules to award the wife an interest in the husband's expectation of ultimately receiving benefits under

The Court also stated that such an award would mechanically deprive the husband of a portion of the benefit that Congress, by cutting off a divorced spouse's benefits in 45 U.S.C. §231d(c)(3), had indicated was designed for the employee spouse alone.[39]

Finally, the Court held that to order an off-setting award to the Wife of present community property to compensate her for her interest in her husband's expected benefit would improperly "anticipate" benefits payment, in violation of §231m of the Railroad Retirement Act by allowing the Wife to receive her interest before the date Congress has set for any interest to accrue and also frustrate the statutory policy of protecting the employee since the award

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39 Id. at 583.

would impair the Husband's economic security.[40]

G. APPLICATION OF HISQUIERDO ANALYSIS TO INSTANT CASE

The applications of Court's analysis in Hisquierdo to the instant makes it clear that the trial court's characterization of the military retired pay as "alimony" in the instant case impermissibly conflicts with the provisions of the USFSPA.

First, the Court in Hisquierdo made it clear that for the most part, the whole subject of domestic relations belongs to the state courts and not to the courts of the United States. However, the Court went on to say that when state family law has come into conflict with a federal statute, the Court has limited review under the Supremacy Clause to a

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40 Id. at 588-589.

determination whether Congress has "positively required by direct enactment" that state law be pre-empted.[41] While a mere conflict in words is not sufficient, it must be shown that state family-property law does "major damage" to clear and substantial federal interests before the Supremacy Clause will demand that the state law be overridden.[42]

Elsewhere in the opinion, the Court stated that the pertinent questions in this type of case are "whether the right as asserted conflicts with the expressed terms of federal law and whether its consequences sufficiently injure the ob-

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41 Id. at 581.

42 Id. at 581.

jectives of the federal program to require non-recognition.[43]

First, this Court has made clear that Congress has the power to determine the character of a federally created benefit.[44] In the instant case, Congress has chosen to characterize military retired pay as "property", not "alimony" or anything else.

This Court noted in Hisquierdo that the Railroad Retirement Act's benefits "from their very inception have federal overtones".[45] There can be no question that military retired pay has had federal overtones from its very in

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43 Id. at 583.

44 Id. at 579.

45 Id. at 582.

ception and that the divisibility of the benefits was for the federal purposes discussed infra.

Like the Railroad Retirement benefits, direct payment of the benefits to the former spouse was designed to insure that the benefits actually reached the beneficiary. As the Court stated in Hisquierdo, "it pre-empts all state law that stands in its way. It protects the benefits from legal process "[n]otwithstanding any other law...of any state".[46] Referring to the Railroad Retirement statutory scheme, this Court stated that "it prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy".[47]

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46 Id. at 584.

47 Id. at 584.

Direct payment insures that the former spouse will receive the benefit intended by Congress, not by a state court considering an alimony award. Under 10 U.S.C. §1408(d)(1) the Secretary of Defense shall make payments to the former spouse in the amount of the disposable retired or retainer pay of the member after effective service on the Secretary concerned of a court order requiring such payments.

The legislative history of the USFSPA notes that these procedures "closely parallel the existing provisions applied to employees of the United States (including members of the uniform services) set forth in subsection 459(b) of the Social Security Act (42 U.S.C. §659(b)).[48]

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48 1982 U.S. Code Cong. & Ad. News 1596, 1610.

The reasoning of this Court in Hisquierdo applies to the instant case. To make the Respondent responsible for remitting to the Petitioner her fifty percent (50%) of the retired pay is to disrupt the national scheme for distribution of the retired pay. Should the Respondent fail to make payments to the Petitioner, the Petitioner will have to incur the expense of retaining an attorney to represent her to enforce the Respondent's obligation to make such payments. The effectiveness of the congressional policy of insuring that former spouses receive their portion of the retired pay would be diminished. As this Court stated in Hisquierdo:

> Congress has made a choice and §231m protects it. It is for Congress to

> decide how these finite funds are to be allocated...any automatic dimunition of that amount frustrates the congressional objective. 439 US at 585.

In this case, state courts are not required to treat disposable, retired or retainer pay either as property solely of the member or as property of the member and his spouse. 10 U.S.C. §1408(c)(1) authorizes the state courts to do so. However, once a state court determines that a former spouse is entitled to a percentage of the "property" it may not utilize the vehicle of permanent periodic alimony to effectuate the distribution of that "property" because that characterization and utilization of "alimony" results in a dimunition of the value of the benefit to the former spouse and penalizes the former spouse whom Congress sought to protect by enacting this legislation.

In the words of the Court in Hisquierdo, "it thus causes the kind of injury to federal interest that the Supremacy Clause forbids. It is not the province of state courts to strike a balance different from the once Congress has struck".[49]

The retired pay created by Congress vests in the former spouse a life interest that does not terminate upon remarriage of the non-military spouse. The life interest in this property is distributed through a direct payment system with the distribution of a separate check to the former spouse. The direct payment system would not result in a tax deduction for the member, nor is it taxable as income for the former spouse since a property payment to

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49 Hisquierdo, supra, 439 U.S. at 590.

the former spouse would not be spousal support.[50]

By characterizing the retired pay as "alimony" owed by the retired member, the trial court transformed this property interest into a common variety of alimony subject to modification for any of a number of reasons, terminable upon remarriage, potentially unenforceable, taxable as income to a former spouse and deductible by the former member.[51]

As in Hisquierdo, the trial court's characterization "mechanically deprives" petitioner of the full value of property intended for petitioner's benefit. Certainly, this

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50 U.S. v. Davis, 370 U.S. 65 (1962).

51 I.R.C. §§71(a) and 215.

is a far cry from what Congress intended this "property" to be in states which opted to treat the retired pay as the property of both the member and his spouse.

H. THE HARTZELL CASE

The only Florida appellate court which has written an opinion on this question has recognized the limitation on the state court once the determination has been made to treat the retired pay as property of both the member and his spouse. In Hartzell v. Hartzell, 434 So.2d 353 (Fla.App.Dist. 1983), the Fourth District Court of Appeal considered whether military retirement benefits were susceptible of equitable distribution. The Court cited 10 U.S.C. §1408 as permitting an ex-spouse to reach as much as fifty percent (50%) of

the disposable retired or retainer pay.[52]

In Hartzell there were two assets accumulated during the marriage: the martial home which was sold with the net proceeds divided between the parties; and the former husband's entitlement to military retirement benefits. The trial court did not characterize the award in the case but the appellate court assumed that it was intended to effect an equitable distribution.[53] The appellate court could not determine from the record whether the Florida trial court had made the award of lump sum alimony to the former wife to balance the husband's retirement

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52 Hartzell, supra, 434 So.2d at 354.

53 Id. at 353.

benefits. However, the court noted as follows:

> We note that the parties are free to contract such an exchange of interests, but the trial court is not, being limited to the statutorily authorized method of distributing "disposable, retired or retainer pay" should it find that such a division of property is warranted. We conclude the lump sum alimony award cannot be deemed a distribution of military retirement pay. Since it has no other basis of support in the record, this award must be reversed." Hartzell, supra, 434 So.2d at 355.

The court remanded the cause for reconsideration by the lower court for modification "as may be necessary to effectuate an equitable distribution based on the present record or supplemented by additional evidence".[54]

Hartzell is the first case in Florida subsequent to the USFSPA to consider this question and as such it is the only

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54 Id. at 355.

authority in the state as to how retired or retainer pay must be distributed once a determination has been made to regard retired pay as the property of the retired member and the former spouse.

As such, the Hartzell case stands for the proposition that such property cannot be deemed to be a distribution of military retirement pay by characterizing it as "lump sum alimony". The Court recognized that the "statutorily authorized method" of distributing the retired pay is by equitable distribution, not by an alimony award.

Furthermore, Petitioner submits that the USFSPA itself provides the vehicle or mechanism by which such property is distributed in the form of the direct pay provision contained in 10 U.S.C. §1408(d)(1). Any other vehicle such as alimony is not "statutorily authorized"

and is pre-empted by the federal direct pay distribution mechanism.

IMPORTANCE OF QUESTION PRESENTED

The USFSPA has been characterized as, "[n]ext to the introduction of ERA and the extension of the Voting Rights Act...the most important advancement for equal rights...of this congressional session".[55]

A great amount of legal literature has already been written about this legislation which is still quite new.[56]

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55 Horkovich at 287, quoting Reaves, "Divorced Military Wives Hopeful", Dayton Daily News, August 2, 1982 at 20, Col 3 (Statement of Rep. Jake Pickel).

56 Winter, "Divisibility of Military Nondisibility Retirement Pension Benefits Upon Marriage; McCarty v. McCarty, the Uniformed Services Former Spouses' Protection Act and Beyond", 22 J Fam. L. 333 (1984); Horkovich, "Uniformed Services Former Spouses' Protection Act: Congress' Answer to McCarty v. McCarty Goes Beyond the Fundamental Question", 23 A.F.L. Rev. 287 (1982-83); Hauserman & Fethke, "Military Pensions as Divisible Assets: The Uniformed Services Former Spouses' Protection Act", 11 J. Legis. 27 (1984); Mallory, "Military Retired Pay and Divorce: Congress Retires McCarty v. McCarty - Is That Enough?", 40 Wash. & Lee. L.Rev. 271 (1983).

As has been pointed out in this brief, the legislation authorizes state courts to treat military retainer pay as property solely of the retired member or as property of the member and his spouse in accordance with the laws of the jurisdiction of such courts. Although the legislation purports to merely erase the effect of the McCarty decision of this court, in fact, the legislation goes far beyond this and creates benefits for the former spouse which were beyond anything former spouses had enjoyed in the past.

The Act provides for direct payment of this retired pay to the former spouse upon receipt by the Secretary of Defense

of a court order requiring such payments.

In addition, the Act provides other benefits such as medical and commissary privileges. This is, without a doubt, a federal program in every respect. Once a former spouse is determined by a state court to be entitled to division of this "property", as it is referred to in the statute, the legislation provides a federal distribution mechanism to accomplish the congressional objective of getting benefits to the former spouses.

It would totally defeat the purpose of this legislation for the "vagaries of state law" to enter rulings which treat retired pay as the property of the retired member and his spouse, but establish their own mechanisms for dis-

tribution which result in a dimunition of the value of that property.

If the decision of the Circuit Court is allowed to stand, the Petitioner will be deprived of the full benefit Congress decided to make available to her. Even more disturbing is the fact that the Respondent may seek to modify or even eliminate the payment at any time if he can show there are "changed circumstances" under Florida law.

Moreover, while the Respondent can remarry and retain his retired pay, the Petitioner loses her retired pay under Florida law should she remarry. This possible scenario is grossly unfair and certainly was not intended by Congress.

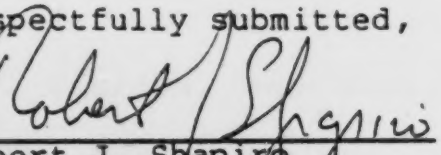
Finally, if such an anomalous result could occur as a result of the operation of Florida law, it must be remembered that forty-nine other states are going

to be distributing and characterizing military retired pay in accordance with their own laws regarding the distribution of marital estates. Therefore, former spouses in the fifty states could receive varying benefits from this federal program because the courts at each of the fifty states might characterize and distribute the retired pay in a manner at odds with that which is mandated in the legislation.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a writ of certiorari should issue to review the judgment of the Fifth District Court of Appeal.

Respectfully submitted,



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Attorney for Petitioner

Dated: August 27, 1984

APPENDIX A

IN THE CIRCUIT COURT IN AND
FOR ORANGE COUNTY, FLORIDA
CIVIL ACTION NO. CI 81-12127

IN RE: The Marriage of
DONALD M. SIMPSON,
Husband,
and
ELEANOR S. SIMPSON,
Wife.
_____/

FINAL JUDGMENT

THIS ACTION was heard before the Court on May 3, 4 and 5, 1983. On the evidence presented, it is hereby ORDERED AND ADJUDGED that:

1. The bonds of marriage between Husband, DONALD M. SIMPSON, and Wife, ELEANOR S. SIMPSON, are dissolved a vinculo matrimonii because the marriage is irretrievably broken.

2. All of the stocks held by the parties, as reflected on the Addendum

Updating Joint Stipulation of Assets of the Parties, shall be equally split and divided among the parties, with all odd shares incapable of division being sold and/or liquidated with the procceds from same being equally divided.

3. All of the mutual funds held by the parties, as reflected on the Addendum Updating Joint Stipulation of Assets of the Parties, shall be equally split and divided among the parties, with all odd shares incapable of divison being sold and/or liquidated with the proceeds from same being equally divided.

4. The certificate of deposit currently held by the parties at First Federal Seminole Savings and Loan Association, shall be equally split and divided among the parties upon maturity.

5. All jointly held cash in the form of broker accounts, including Merrill, Lynch account #76262120 and money market funds, shall be split and equally divided between the parties.

6. All other cash and cash accounts and municipal bonds currently held by each respective party shall be retained by each party as presently held and listed on the Addendum Updating Joint Stipulation of Assets of the Parties.

7. All of the KEOGH accounts of ELEANOR S. SIMPSON, as listed on the Addendum Updating Joint Stipulation of Assets of the Parties, shall be retained by ELEANOR S. SIMPSON for her exclusive use and benefit.

8. ELEANOR S. SIMPSON is hereby awarded as permanent, periodic alimony fifty percent (50%) of the net disposable proceeds of DONALD M. SIMPSON's retired U.S. Army pay

entitlement. DONALD M. SIMPSON shall pay fifty percent (50%) of the net disposable proceeds of his retired U.S. Army pay entitlement once a month, on or before the fifth (5th) day of each month, to the Clerk of the Circuit Court, Ninth Judicial Circuit in and for Orange County, County Courthouse, Florida, and the Clerk shall promptly remit said monies to ELEANOR S. SIMPSON, whose present address is 3207 Cullen Lake Shore Drive, Orlando, Florida. There is assessed as costs for handling each such payment the additional sum of TWO DOLLARS ($2.00) which DONALD M. SIMPSON shall pay to the clerk each time payments are made. Such payments plus cost are to be made by either cash, Postal Money Order, American Express Money Order, Bank Draft, Cashier's Check or Certified Check.

9. DONALD M. SIMPSON is hereby awarded the 1979 Chevrolet Monte Carlo, boat, guns, fishing equipment, tools, accessories and other personal effects, and ELEANOR S. SIMPSON is hereby awarded her 1980 Cadillac and other personal effects in recognition of the approximate equal value of each parties' said property.

10. All of the personal property listed and scheduled on the MJM AppraiSales, Inc., Attachment C to Husband's Current Financial Affidavit as of April 21, 1983, shall be equally divided by the parties through agreement on the basis of the listed values therein within ten (10) days of entry of this Final Judgment. However, if the parties cannot agree upon such division, upon proper motion before this Court, the Court shall make said division.

11. The parties shall each be awarded equal interest in the marital home, and the house shall be partitioned through a public sale in the event the parties have not sold the house themselves within six (6) months from the date of the entry of this Final Judgment. All net proceeds from the sale shall be equally distributed between the parties.

12. ELEANOR S. SIMPSON shall be awarded the temporary use and possession of the said marital home until said sale.

13. ELEANOR S. SIMPSON is awarded the sum of TWENTY THOUSAND DOLLARS ($20,000.00) as restitution and reimbursement of one-half (1/2) of the marital assets which were expended by DONALD M. SIMPSON.

14. There shall be no other awards of alimony, periodic, rehabilitative or lump sum, other than set forth above.

15. There are no findings of any special equities whatsoever as a result of the acquisition of the marital estate through the joint efforts of the parties without contribution from any source wholly unconnected with the marriage.

16. There shall be no award of attorneys' fees and each party shall be responsible for their own attorney's fees and costs.

17. There shall be no further adjustment of the equities between the parties other than set forth above.

18. Any and all other orders of Court which conflict with this Final Judgment are hereby vacated.

19. The Court being advised of the Husband's agreement to voluntarily assign all Survivor Benefits of Military Retirement Pay to the Wife, such voluntary assignment is incorporated herein and the parties are directed to

execute all written documents necessary now, or in the future, to comply herein.

20. All parties shall perform all acts and do all things necessary and cooperate with one another to effectuate the intents, purposes, and directions of this Order within ten (10) days from the date of the entry of this Final Judgment.

DONE AND ORDERED in Chambers at Orlando, Florida this 24th day of May, 1984.

/s/
WILLIAM C. GRIDLEY, CIRCUIT JUDGE

I hereby certify that a true copy of the foregoing has been furnished to Terry C. Young, Esquire, P O Box 2631, Orlando, Florida 32802 and Ben W. Thompson, Esquire, P O Box 466, Dade

City, Florida 33525 by mail this 24th day of May, 1984.

Secretary to above Circuit Judge

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1984

NOT FINAL UNTIL TIME
EXPIRES TO FILE
REHEARING MOTION, AND,
IF FILED, DISPOSED OF.

ELEANOR S. SIMPSON,

Appellant,

v. Case No. 83-825

DONALD M. SIMPSON,

Appellee.

_____/

Decision filed January 31, 1984

Appeal from the Circuit Court for Orange County, William C. Gridley, Judge.

Ben W. Thompson, Dade City, for Appellant

Terry C. Young, of Giles, Hedrick & Robinson, P.A., Orlando, for Appellee.

PER CURIAM.

AFFIRMED.

ORFINGER, CJ., UPCHURCH, F. and SHARP, W., JJ., concur.

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FIFTH DISTRICT

ELEANOR S. SIMPSON,

Appellant,

v. Case No. 83-825

DONALD M. SIMPSON,

Appellee.
_____/

DATE: May 29, 1984

BY ORDER OF THE COURT:

ORDERED that Appellant's MOTION FOR REHEARING, filed February 15, 1984, is denied.

I hereby certify the foregoing is (a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

BY:/s/_____
Deputy Clerk

(COURT SEAL)

cc: Terry C. Young, Esquire
Ben W. Thompson, Esquire
Mary B. Steddom

APPENDIX D

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT, 10 U.S.C. §1408(c)(1)

Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

APPENDIX E

ARTICLE VI, cl 2,
UNITED STATES CONSTITUTION

This Consitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.